CHAPTER 3

REPRESENTATIONAL RIGHTS

3-1. Introduction. This chapter will look at several rights available to the union and the employees based on the union's status as the exclusive representative.

3-2. Right of Exclusive Representatives to Attend Formal Meetings/ Investigatory Examinations Between Management and Employees.

a. Statutory Provision.

5 U.S.C. § 7114, establishes an exclusive representative's right to represent unit employees. This includes granting the exclusive representative the right to attend certain formal meetings and investigatory examinations between management and unit employees. Section 7114(a)(2) provides as follows:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at:
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> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representative concerning any grievance or any personnel policy or practices or other general condition of employment; or
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> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if--
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> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee and
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> (ii) the employee requests representation.
>
> (3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

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b. Formal Discussions.

The above section specifically requires an agency to afford the exclusive representative an opportunity to be represented at any formal discussion[1] between

[1] Inspectors general ARE agency representatives when they conduct an employee examination covered by §7114(a). NASA v. FLRA, 119 S. Ct. 1979 (1999) (finding that while Congress intended that OIGs would enjoy a great deal of autonomy, the OIG investigative office still performs on behalf of the particular agency in which it is stationed and therefore acts as an agency representative when it conducts examinations covered by §7114(a)).

management and an employee concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit. The intent is to provide the exclusive representative with the opportunity to safeguard the interests of unit employees at formal meetings held by management. It requires management to give the union reasonable advance notification of the time, place and general subject of the meeting and an opportunity to attend the meeting. If the union has been properly notified and does not appear at the meeting, it has waived the right to be represented and the meeting may be held without the union. "Represented" includes not only the right to be present at the meeting but the right to fully participate in the discussion. The mere inadvertent presence of union officials is insufficient to satisfy management's duty under the Statute. That is, management must actually notify the union of the time and place of the meeting so that it might choose its own representative. McClellan AFB, 29 FLRA 594 (1987).

There is no right of representation at nonformal meetings or interviews held by management; thus, the problem is one of defining "formal" and "nonformal." A "formal discussion" is determined by the composition of the persons in attendance and the content of the discussions.

Personnel policies or practices, or other general conditions of employment are those subjects which affect employees in the unit generally, as opposed to individually. Meetings discussing changes in personnel policies or practices or general working conditions clearly require that the union be given an opportunity to be represented. The union also has the right to be represented at meetings discussing existing personnel policies, practices and general working conditions.

"Grievance" is any matter in which an employee is seeking redress from management to include redress sought through third parties such as the Merit Systems Protection Board. VA Medical Center, Denver, Colorado v. FLRA, 44 FLRA 408 (1992). This is more than a gripe. The exclusive representative has a right to be present at any grievance discussion affecting unit employees. This right exists at all stages of the grievance procedure and includes the so-called "informal" stage in which an employee is initially discussing the grievance with the supervisor. (Note: a pre-disciplinary oral reply of an employee is not considered a formal discussion and the exclusive representative has no right to be present. DOJ v. AFGE, 29 FLRA 52 (1987)). It also includes a meeting with any management representative and any unit employee involving an adjustment of the grievance, or meetings to interview employee witnesses for third-party proceedings, such as MSPB hearings or EEOC hearings. NTEU v. FLRA, 774 F.2d 1181 (D.C. Cir. 1985); McClellan AFB, supra. This right exists even if the employee does not want the union present because the union represents the interests of all bargaining unit employees, and any grievance could impact on other employees.

Several meetings between an employee and management representatives on individual employee matters have been found not to fall within the definition of this term. They include counseling sessions, SSA and AFGE, 14 FLRA 28 (1984); meetings at which an employee is disciplined, discussion of individual job performance and

meetings to deliver work instructions or to discuss work assignments. IRS Brookhaven and NTEU, 9 FLRA 930 (1982).

The FLRA will look at the totality of circumstances to determine if a meeting is formal. Some of the factors considered are: where the meeting was held, how long it lasted, who was present, the agenda, and whether notes were taken. The following case addresses factors determining the "formality" of a discussion:

SSA, SAN FRANCISCO
and
AFGE
10 FLRA 115 (1982)

(Summary)

According to the parties' stipulation of facts, the operations supervisor at one of the activity's branch offices, following the 60-day detail of a unit employee to another city, held individual discussions with unit employees in which she solicited comments and suggestions regarding the assignment and distribution of work. The union was given no notice of these discussions.

The General Counsel contended that the individual meetings constituted direct dealings with unit employees concerning conditions of employment and therefore constituted an unlawful bypass of the union. It was also contended that the meetings were formal discussions within the meaning of 5 U.S.C. 7114(a)(2)(A). The activity argued that there was no duty to notify the union because management had the right, under the negotiated agreement, to hold discussions on the day-to-day operations of the activity. It further argued that the meetings were permissible informal contacts for the purpose of obtaining input from the employees. Besides, a union representative was present at a staff meeting at which he did not express his views: hence the union constructively waived its right to "consult" on the matter.

The Authority dismissed both the "bypass" and "formal discussion" allegations because, based on the stipulated facts, the General Counsel did not meet his burden of proving that the individual meetings were either formal discussions or a bypass of the union. The bypass allegation was dismissed because there was no evidence in the record concerning the specific content of the communications. All it showed was that the supervisor initiated the conversations "solely to gather information to assist the Respondent in making a non-negotiable management determination concerning the assignment of work."

The central issue of the case, the Authority noted, was whether the discussions were formal or informal. However, it was unable to determine whether the meetings were formal because

> . . . the stipulated facts do not reveal (1) whether the individual who held the discussions is merely a first-level supervisor or is higher in the management hierarchy; (2) whether any other management representatives attended; (3) where the individual meetings took place (i.e., in the supervisor's office, at each employee's desk, or elsewhere); (4) how long the meetings lasted; (5) how the meetings were called (i.e., with formal advance written notice or more spontaneously and informally); (6) whether a formal agenda was established for the meetings; (7) whether each employee's attendance was mandatory; or (8) the manner in which the meetings were conducted (i.e., whether the employee's identity and comments were noted or transcribed).

Let's consider each of the factors mentioned by the Authority. It is not clear why it would want to know whether the individual holding the discussion is "merely a first-level supervisor or is higher in the management hierarchy," for certainly a first-level supervisor can conduct a formal discussion. Our guess is that the Authority recognizes that discussions held by first-level supervisors are often informal, involving shoptalk and counseling sessions about an individual's conduct. (*See* 124 Cong. Rec. H 9650, daily ed., Sept. 13, 1978, where Congressman Ford said the following: "The compromise inserts the word 'formal' before discussions merely in order to make clear that this subsection does not require that an exclusive representative be present during highly personal, informal meetings between a first-line supervisor and an employee.") These meetings are apt to be routine, held at the desks or workstations of the employees, and of brief duration. In short, a large proportion of the discussions between a first-line supervisor and employees under his supervision are going to be "informal." In making the distinction between discussions held by "merely a first-line supervisor" and officials higher in the management hierarchy, the Authority is perhaps sending a signal to the agents of the General Counsel to take an especially critical look at alleged formal discussions held solely by first-line supervisors.

The second factor, whether more than one management representative attended, seems an obvious test of formality. (*See*, in this connection, the IRS, Fresno Service Center case, 7 FLRA 371, where an EEO precomplaint meeting called and chaired by a supervisor and attended by an EEO Officer and an EEO Counselor was found to be a

formal discussion.) FLRA also may have mentioned this factor because section 7114(a)(2)(A) itself defines a formal discussion, in part, in terms of "one or more representatives of the agency."

The third factor, involving the location of the discussion, is somewhat elaborated on by the Authority in its parenthetical remarks. The implication seems to be that discussions held away from the employee's desk or work station are more likely to be formal than discussions held at the employee's desk. (*See* SSA, San Francisco, 9 FLRA 48 (1982), where FLRA held that unscheduled and brief meetings held by the branch manager at the desks of individual employees were not formal discussions. Contrast this case with IRS, Fresno, where the precomplaint meeting was held in an office away from the employee's normal work station.)

The duration factor is also captured in the SSA, San Francisco case mentioned above. The briefness of the conversations held by the branch manager in the case is one of the factors cited in supporting the conclusion that the meetings were not formal discussions.

The fifth factor, how the meetings were called, also is elaborated on by the Authority in its parenthetical comments. Presumably, written notice of a meeting tends to indicate "formality." (In EPA, 8 FLRA 471 (1982), the ALJ found that a discussion that was not prearranged but based on a spur-of-the-moment request by the branch chief that her secretary enter her office to sign a written assurance concerning the employee's acceptance of a permanent job at another agency was not a formal discussion.)

The "agenda" factor is illustrated by the Authority's decision in the HEW, Atlanta case, 5 FLRA 458, where it held that new employee orientation sessions were formal discussions because, among other things, an agenda had been established by management to discuss a number of matters involving general conditions of employment.

The HEW, Atlanta case also illustrates the "mandatory attendance" factor--the seventh listed by the Authority. That case should be contrasted with the IRS, Brookhaven Service Center case, 9 FLRA 930 (1982), where the Authority held that noncoercive interviews of unit employees in preparation for third-party proceedings do not constitute formal discussions provided that certain precautions, such as obtaining the employee's participation on a voluntary basis, are taken. In subsequent cases, the Authority recognized that an interview of a bargaining unit employee concerning a grievance could also be a formal discussion, triggering the union's right to notice and opportunity to attend. Warren Air Force Base and AFGE, 31 FLRA 541 (1988).

The eighth and final factor, whether a record or notes of the meeting were kept, is a rather obvious indicator of formality. But there are exceptions. For example, the management representative conducting a Brookhaven pre-hearing interview almost certainly will take notes. However, the note-taking indicator of formality is nullified by, among other things, the fact that employee participation is voluntary--an indicator, as suggested above, that a meeting is not a formal discussion.

Although the Authority's checklist of factors to consider should be of some help in determining whether a meeting is "formal," it is hardly a formula. There is no suggestion that a certain number of the criteria must be satisfied before a meeting can be regarded as "formal" Nor is there any indication as to the relative importance of each criterion.

Note: For a good discussion on formal discussion and Brookhaven Warnings, *see* Marine Corps Logistic Base and AFGE, 45 FLRA 1332 (1992); and GSA and NFFE, 50 FLRA 401 (1995). Additionally, Brookhaven Warnings are discussed in detail at the end of this chapter.

The following case provides a good summary of the law in this area.

The DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER, LONG BEACH, CALIFORNIA,
Petitioner,
v.
FEDERAL LABOR RELATIONS AUTHORITY, Respondent;
American Federation of Government Employees Council 33, AFL-CIO Local 1061,
Respondent-Intervenor.
FEDERAL LABOR RELATIONS AUTHORITY, Petitioner,
v.
The DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER, LONG BEACH, CALIFORNIA,
Respondent.

16 F.3d 1526

United States Court of Appeals,
Ninth Circuit.
Argued and Submitted April 8, 1993.
Decided Feb. 25, 1994.

Appeal for the Federal Labor Relations Authority.

Before FARRIS, NORRIS and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

A Department of Veterans Affairs medical center challenges two determinations by the Federal Labor Relations Authority ("FLRA") that it committed unfair labor practices. We uphold both determinations.

In preparation for the Merit Systems Protection Board ("Board") hearing of a member of Local 1061 of the American Federation of Government Employees ("the Union"), an attorney representing the Department of Veterans Affairs Medical Center of Long Beach, California ("the Hospital") interviewed, by telephone, several Union members who were potential witnesses at the Board hearing. Although the Union was representing the employee whose case the Board was to consider, the Hospital did not give the Union any notice of the interviews. One of the bargaining unit employees interviewed told her supervisor that she did not wish to be questioned, and was told that she had no choice. She was not told that she could refuse to answer the Hospital attorney's questions without penalty of reprisal.

In a decision and order dated August 27, 1991, (41 FLRA 1370) the FLRA concluded that the Hospital committed an unfair labor practice under 5 U.S.C. § 7114(a)(2)(A) when it failed to give the Union notice of the interviews, and committed a second unfair labor practice under 5 U.S.C. § 7116(a)(1) when it failed to advise the reluctant employee that she could refuse to be questioned. We hold that the FLRA did not act arbitrarily or capriciously with respect to either conclusion, deny the Hospital's petition to review its order, and grant the Union's and the FLRA's cross-application to enforce the FLRA's order.

I.

In January, 1988, the Hospital fired Gary Dekoekkoek, a Union member, for failing to keep his medical supplies cart clean and for being late to work. He appealed his termination to the Board. The Union represented him throughout the discharge proceedings. The Hospital was represented by staff attorney Patricia Geffner.

Geffner prepared for the Board hearing by conducting telephonic interviews with several Union employees concerning the events that led to Dekoekkoek's termination. She spoke in all to seven employees, some for up to an hour. The conversations concerned Dekoekkoek, his immediate supervisor, and the incident that led to his termination. Two employees spoke to her from the office of their supervisors. The record does not reveal the circumstances in which the other employees were asked to speak to Geffner. No Union representative was notified or invited to be present at any interview.

One of the employees Geffner spoke to was Stella Smith, who worked in the same department as Dekoekkoek. Smith was called to the office of her second-level supervisor, who asked her whether she wanted to be questioned about Dekoekkoek. She told the supervisor that she did not want to become involved, and was excused. Later that day, however, the supervisor called her in again and told her that she was required to answer Geffner's questions. The supervisor telephoned Geffner from his office, handed the receiver to Smith, and left the room. Geffner spoke with Smith about Dekoekkoek for approximately five minutes.

Before the Board hearing, Geffner called Dekoekkoek's Union representative, told him of her interviews, and furnished him with the names of the employees with whom she had spoken. The Union filed charges with the FLRA, which issued a complaint alleging that: 1) the failure to give the Union representative the opportunity to be present at the interviews violated 5 U.S.C. § 7114(a)(2)(A), which expressly calls for such representation during formal discussions concerning a grievance; and 2) the Hospital's failure to assure Smith that she would not be subject to reprisal if she refused to participate in the interviews violated 5 U.S.C. § 7116(a)(1), which declares an unfair labor practice an agency's actions in coercing an employee in the exercise of his or her rights under the Federal Service Labor-Management Relations Statute ("the Statute").

A hearing was held on the charges before an Administrative Law Judge ("ALJ"). The ALJ decided in favor of the Union on the first issue and in favor of the Hospital on the second. Both parties appealed the ALJ's decision. On appeal, the FLRA ruled in favor of the Union on both issues. The Hospital now petitions for review of the judgment, and the FLRA and the Union cross-apply for enforcement of the order.

II.

Congress enacted the Statute, 5 U.S.C. § 7101 et seq., to grant public employees the right to "organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them." 5 U.S.C. § 7101(a)(1). It created the FLRA to administer the Statute. *See* 5 U.S.C. § 7105. We have jurisdiction to review the FLRA's decisions under 5 U.S.C. § 7123. That provision directs us to conduct our review in accordance with 5 U.S.C. § 706, which in turn permits us to set aside the agency's action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Bureau of Land Management v. FLRA, 864 F.2d 89 (9th Cir.1988) (*citing* American Fed'n of Gov't Employees v. FLRA, 802 F.2d 1159, 1161 (9th Cir.1986)). If the agency's action is " 'none of the above,' " we must affirm the FLRA's decision and order. Department of Veteran's Affairs Medical Center, Denver, Colorado v. FLRA & Am. Federation of Gov't

Employees, Local 2241, 3 F.3d 1386, 1389 (10th Cir.1993) ("Local 2241 ") (*citing* United States Dep't of Energy v. FLRA, 880 F.2d 1163, 1165 (10th Cir.1989)).

III.

We begin our analysis by considering the statutory framework in which this case arose. The Statute seeks to balance the interests of management against those of labor. It gives the edge to management during investigations of alleged misconduct on the part of bargaining unit employees. During that time, employees have a duty to account for their performance and conduct, Portsmouth Fed. Employees Metal Trades Council and Portsmouth Naval Shipyard, 34 FLRA 1150, 1990 WL 123977 (FLRA) (1990), and management need not notify the union of the interviews it conducts with union members and offer its representative an opportunity to be present. Cf. 5 U.S.C. § 7114(a)(2)(A) (giving the union the right to be present at formal discussions concerning a grievance).

When management decides that it knows all the necessary facts, however, it ends its investigation. It may then decide to discipline the union member whom it investigated. If, after the employee is notified that he is being disciplined, he files a grievance, the balance of interests shifts. At that point, the Statute gives the union the right to be present at all formal discussions concerning the grievance. Id.

Sound policies support shifting the balance at that point. Before disciplinary action is taken, the employer must be given an opportunity to uncover the facts. Only after a thorough investigation can the employer know whether disciplinary action is warranted. For that reason, the Statute gives the employer the advantage at the investigatory stage--although even at that stage the employee under investigation may have a union representative present if he so wishes. In any event, it is assumed under the statute that the employer will complete the investigation before deciding to discipline an employee, and that when it does so it will have determined the relevant facts. Such an assumption is reasonable. If the employer has not determined the facts, disciplinary action is certainly unjustified. This is true with respect even to minor disciplinary matters, but it is particularly true with respect to termination, the disciplinary action at issue in this case. An employee who is fired from his or her job is subjected to economic capital punishment. The discharged employee may have to explain to a second employer that a first employer found him undesirable. His chances of finding work again are problematic, especially where, as here, he performs unskilled or semi-skilled labor. After the employer's investigation is complete, therefore, and the decision to discipline the employee has been made, the reason for affording the employer a procedural advantage disappears. For that reason, once the employee has filed a grievance, the Statute affords the union the right to

be present at all formal discussions regarding the grievance. This requirement allows the union to protect its members against intimidation and coercion, and allows it to participate fully in a proceeding that may affect all bargaining unit employees, not just the one being disciplined. *See* Nat'l Treasury Employees Union v. Fed. Labor Relations Authority, 774 F.2d 1181, 1188 (D.C.Cir.1985) ("NTEU I ").

Some may argue that Congress did not choose the best point at which to shift the balance between the interests of management and those of labor. That argument is irrelevant here. Our task is not to rewrite the Statute, but rather to determine whether the FLRA interpreted it in an arbitrary and capricious manner.

IV.

We now consider whether the FLRA acted arbitrarily and capriciously in determining that the Union had the right under § 7114(a)(2)(A) of the Statute to be present during Geffner's telephonic interviews of Union employees.[2]

Section 7114(a)(2)(A) grants a union the right to be represented "at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment." 5 U.S.C. § 7114(a)(2)(A). The Hospital contends that the interviews in this case were not "formal discussions" and did not concern a "grievance" within the meaning of the statute.

A. Formal Discussion

[2] The Hospital contends that our review should be de novo, because the FLRA's current interpretation of 5 U.S.C. § 7114(a)(2) is based on an out-of-circuit case, NTEU I, and because, before NTEU I was decided, the FLRA interpreted the statute differently. Compare Internal Revenue Svc. and Brookhaven Svc. Center, 9 FLRA 930 (1982) ("Brookhaven"), with Dep't of Air Force, McClellan Air Force Base v. Am. Federation of Gov't Employees, Local 1857, 35 FLRA 594 (1990) ("McClellan"). We find this argument unpersuasive. The FLRA is free to change its interpretation of the Statute after reweighing competing statutory policies. *See* New York Council, Ass'n of Civilian Technicians v. FLRA, 757 F.2d 502, 508 (2d Cir.1985), *cert. denied*, 474 U.S. 846, 106 S.Ct. 137, 88 L.Ed.2d 113 (1985). The FLRA's current position is both carefully-reasoned and well-established. See, e.g., McClellan, at *8-9 (explaining the FLRA's current interpretation of 5 U.S.C. § 7114(a)(2)). Furthermore, to review de novo any changed agency position is, in effect, to force an agency to adhere to what may be an erroneous view simply to protect the deference it should be accorded in any case. Finally, under NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 124 n. 20, 108 S.Ct. 413, 421 n. 20, 98 L.Ed.2d 429 (1987), the consistency of an agency's interpretation is only one factor to be considered in deciding upon the degree of deference of appellate review. Even if we were to agree that the FLRA's changed interpretation should change the scrutiny with which we review its actions, we would not necessarily agree that we owe no deference at all to the agency's decision. In any event, because NTEU I is well-reasoned and because the FLRA's adoption of it is persuasive, we attach no significance to the FLRA's earlier lack of consistency in interpreting this provision of the Statute.

Generally speaking, the scope of formality within the meaning of the Statute is extremely broad. A meeting is formal unless it is a "casual conversation or a conversation that followed from an impromptu meeting." McClellan at * 9. See also Local 2241, 3 F.3d at 1389 (a meeting is formal unless it is a "spontaneous or chance meeting [ ] in the workplace"); NTEU I, 774 F.2d at 1190 (to escape formality, a meeting must be an "impromptu gathering"). Within that broad compass, whether a discussion is "formal" depends on the totality of the circumstances. The FLRA has commonly looked to a number of specific factors to determine formality, such as the level in the management hierarchy of the person who called the discussion; whether other management representatives attended the discussion; where the discussion took place; how long it lasted; how the employee was summoned to it; whether there was a formal agenda; whether the employee was required to attend; and whether the employee's name and comments were transcribed. United States Dep't of Labor, Chicago, Ill. v. Am. Federation of Gov't Employees, Local 648, 32 FLRA 69, 1988 WL 212939 (FLRA) at * 4-5 (1988) ("Chicago ").[3]

The Hospital contends that the interviews at issue here were not formal because they were conducted by telephone, because there was no advance announcement or scheduling, and because the employees were left alone in their supervisors' offices while they talked to the Hospital's counsel. The FLRA disagreed, and we affirm.

We note at the outset that these interviews were not impromptu or spontaneous gatherings. Rather, they were planned question-and-answer sessions that the employees were required to attend. Therefore, they fall within the broad meaning of "formality" for the purpose of the Statute. Our inquiry into their formality could end here. However, because the FLRA considers formality under a totality test, we will review the importance of the factors on which the Hospital relies.

The FLRA considered in McClellan whether the fact that an interview is conducted over the telephone removes it from the scope of the Statute. It concluded that it does not. McClellan at * 9. To construe the Statute to exclude telephonic questioning, no matter what other indicia of formality the discussion may have, would be to give the Statute a reading at odds with its plain language, the FLRA's decisions, and our obligation to affirm those decisions unless they are arbitrary and capricious. An interview "involves questioning to secure information; obviously, it can be done in an number of different ways by a variety of different people." Nat'l Treasury Employees Union v. Fed. Labor Relations Authority, 835 F.2d 1446, 1450 (D.C.Cir.1987) ("NTEU II ") (discussing the term "examination"). Indeed, the fact that an interview is conducted over the telephone may even increase its formal nature. An interviewer's facial

[3] The agency has emphasized that its list is not exhaustive and that other factors may be applied if they are appropriate to a particular case. Id.

expressions are not visible over telephone, and any silences during questioning are more obvious during a telephonic interview, where the entire focus is on sound, than they might be face-to-face.

The indicia of formality in this case were strong. The interviews were conducted in a supervisor's or second-level supervisor's office, an area removed from the employee's normal work environment. The staff attorney represented a high level of management. The interviews lasted between five minutes and more than an hour. They were planned in advance and concerned only one topic, Dekoekkoek's upcoming Board hearing. Under these circumstances, we do not find arbitrary and capricious the FLRA's determination that the interviews were formal. The lack of advance notice to the employees, and the fact that the employees were left alone in their supervisors' offices while they were interviewed, in no way serve to overcome either the deference we owe to the FLRA's determination on this point, or the indicia of formality present in this case. Those indicia strongly rebut any inference of spontaneity that might be raised by the lack of notice and the absence of the supervisors. *See* NTEU I, 774 F.2d at 1190.

In the alternative, the Hospital, relying on IRS, Fresno Svc. Ctr. v. FLRA, 706 F.2d 1019 (9th Cir.1983), argues that we should ignore the FLRA's indicia of formality and look instead to what it calls the "informal purpose" of the interviews. [Blue Brief at 13-14 & n. 7]. We decline this invitation for three reasons. First, the FLRA's indicia of formality provide a method to assess a meeting's formal or informal purpose. Therefore, our discussion above has already carried out the Hospital's request. Second, we are unable to look to the "informal purpose" of the interviews, because their purpose was not informal. Even according to the Hospital's account, the staff attorney "was attempting to gather information as to what potential non-party fact witnesses would say at a [Board] hearing." [Blue Brief at 14]. Preparation for a Board hearing is not an informal goal, and assessing the testimony of potentially adverse witnesses is not an informal undertaking. Finally, the Hospital's reliance on IRS, Fresno is misplaced. In that case, we found the meetings informal only because the EEOC regulatory framework that governed the case explicitly characterized them in that way. Under that framework, the employee was required to try to resolve a complaint on an informal basis before filing a formal complaint. IRS, Fresno at 1023-24. Here, however, no comparable regulatory scheme exists. The record reflects no statutory or regulatory framework that either encourages or requires an employee to attempt to resolve complaints informally. Certainly, here, no Board regulation explicitly or implicitly defines the interviews as informal rather than as formal discussions. To the contrary, the interviews were part of the formal grievance procedure. They were not an effort to preempt the formal process, but a step towards, and a part of, the culmination of that process.

For these reasons, we find that the FLRA acted within its authority in ruling that the interviews were formal within the meaning of the Statute.

In addition, the Hospital contends that no "discussions" took place. It argues that, under the Statute, "discussion" must be "reasonably understood [to mean] . . . negotiation, 'give-and-take,' . . . [an] attempt to reconcile a complaint or to otherwise change the status quo." [Blue Brief at 14]. It contends that, because the interviews here were intended merely to gather facts, they were not discussions.[4]

Under the Statute, however, "meeting" and "discussion" are synonymous. Dept. of Air Force Warren Air Force Base, Cheyenne, Wyoming & Am. Federation of Gov't Employees, Local 2354, 1988 WL 212811 at * 7 (1990) *citing* Dep't of Defense, Nat'l Guard Bur., Tex. Adjutant Gen.'s Dep't, 149th TAC Fighter Group, Kelly Air Force Base, 15 FLRA 529, 1984 WL 35145 (FLRA) (1984) ("Kelly Air Force Base ") at *3. Accord, Local 2241, 3 F.3d at 1389 (citing Kelly Air Force Base, *supra*). Indeed, the FLRA has ruled that even announcements presented by management at gatherings at which union members are not invited to speak are "discussions" within the meaning of the Statute. Kelly Air Force Base, 1984 WL 35145 at * 3. Such an interpretation comports with the statutory goal of vindicating a union's independent right to be present so that it may safeguard the interests of all union employees. *Id*.

Under the Hospital's definition, the Statute would not include an interview of any type--whether of a witness or a principal. Management could exclude union representatives merely by structuring its meetings in a question-and-answer format. We reject the Hospital's attempt to limit the rights of labor under the Statute. The FLRA's implicit finding that the interviews in this case were "discussions" within the meaning of the Statute was neither arbitrary nor capricious.

B. Grievance

The Statute defines "grievance" extremely broadly. It provides that a grievance is "any complaint--

> (A) by any employee concerning any matter relating to the employment of the employee;
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
> (C) by any employee, labor organization, or agency concerning

[4] The Hospital did not raise this argument before the ALJ or the FLRA. It is therefore precluded from raising the issue on appeal unless its "failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U.S.C. § 7123(c). The Hospital calls no such circumstances to our attention. Even had the Hospital preserved this issue for appeal, however, we would have rejected its cramped construction.

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

5 U.S.C. § 7103(a)(9). In conformance with the language of the Statute, the FLRA reads "grievance" broadly, as encompassing statutory appeals, including appeals to the Board. Chicago, 1988 WL 212939 at * 5. *See also* NTEU I, 774 F.2d at 1188 (referring to "the 'all-inclusive' definition of 'grievance' in § 7103(a)(9) and § 7114(a)(2)(A)") (*quoting* H.R.Rep. No. 1403, 95th Cong., 2d Sess. 40 (1978)).

The Hospital contends that the interviews at issue here did not concern a "grievance" because they pertained to a Board hearing rather than to a procedure within the contractual grievance process. Relying on IRS Fresno, it argues that, like the EEOC procedure at issue in that case, the Board hearing here "did not involve any aspect of the collective bargaining agreement." IRS Fresno, 706 F.2d at 1025. [Blue Brief at 15].

IRS Fresno, however, concerned a charge filed under Title VII, a Congressional enactment unconnected to the Statute. The EEOC regulation in IRS Fresno established a procedure for handling such charges unconnected to those established by the Statute. In fact, the collective bargaining agreement in IRS Fresno explicitly excluded from the grievance procedure claims covered by the EEOC. *Id*. at 1024-25. Here, by contrast, we consider a statute that Congress enacted to implement its finding that "labor organizations and collective bargaining in the civil service are in the public interest." 5 U.S.C. § 7101(a). Here, there is no suggestion that the Union's collective bargaining agreement excludes grievances of the type filed by Dekoekkoek, or proceedings such as those established by the Board.

Moreover, the Board hearing in this case did "involve [an] aspect of the collective bargaining agreement." Dekoekkoek initially brought his grievance pursuant to the procedures established in the collective bargaining agreement. [Tr. at 49-50]. Under the Statute, he was permitted to appeal his removal either under that agreement or to the Board. 5 U.S.C. § 7121(e)(1). He chose to appeal to the Board. Thus, unlike IRS Fresno, this case concerns a dispute intimately connected with the Union's collective bargaining agreement.

The language of the Statute is plain: a grievance is "any complaint by any employee concerning any matter relating to the employment of the employee." 5 U.S.C. § 7103(a)(9)(A) (emphasis added). Certainly that applies to any matter arising under the Statute. In IRS Fresno, the question was whether the protections of the Statute apply to proceedings conducted by the EEOC. We concluded that they do not, finding that an

employee's rights as to EEOC proceedings are established by the EEO statute and accompanying regulations. The question here--whether the protections of the Statute apply to proceedings before the Board--is entirely different. It has been answered in the affirmative by the Tenth and District of Columbia circuits.[5] Local 2241, 3 F.3d at 1390-91; NTEU I, 774 F.2d at 1184-89. We now join them.[6]

V.

We turn now to the issue whether the FLRA acted arbitrarily and capriciously in concluding that the Hospital committed an unfair labor practice under § 7116(a)(1) of the Statute when it failed to advise Stella Smith, the employee who did not wish to be questioned, that she could refuse to be interviewed without penalty of reprisal.

When management interviews employees "to ascertain necessary facts" in preparation for third-party proceedings, it must provide certain safeguards to protect the employees' rights under § 7102 of the Statute.[7] Brookhaven, 1982 WL 23283 at. These safeguards are as follows:

> (1) management must inform the employee who is to be questioned of the purpose of the questioning, assure the employee that no reprisal will take place if he or she refuses, and obtain the employee's participation on a voluntary basis; (2) the questioning must occur in a context which is not coercive in nature; and (3) the questions must not exceed the scope of the legitimate purpose of the inquiry or otherwise interfere with the employee's statutory rights.

Id. The FLRA does not require an employer to give the Brookhaven assurances in every case. Instead, it looks to the circumstances of each case to determine whether the employee submitted to questioning voluntarily. Warren, 1988 WL 212811. In this way, it can better determine

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[5] While IRS Fresno is not applicable here, we note that the reasoning of the District of Columbia circuit in NTEU I, rejecting the IRS Fresno analysis, is more persuasive.

[6] The Hospital additionally argues that a union has no right to be present while management discusses an upcoming Board hearing with an employee because it has no obligation to represent the employee before the Board. We reject this argument. The right of the union is independent of that of the employee, whether or not the employee is represented by the union. As long as no conflict exists between the union's right and that of the employee, the union may not be barred.

[7] Section 7102 provides, in part:
Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty of reprisal, and each employee shall be protected in the exercise of such right.

whether the circumstances in which formal discussions occur are coercive. Id.

Here, the FLRA examined all of the circumstances and found that the reluctant employee, Stella Smith, did not submit voluntarily to Geffner's questioning. It found that Smith initially refused to be questioned, consenting to be interviewed only after her supervisor told her that she "had no choice, that [she] had to be [questioned]." [Tr. 63]. It found that other surrounding circumstances added to the coercive nature of the interview. Smith was not interviewed by her own supervisor, but by Geffner, an attorney who worked at a high level of management and who was based in the Hospital's district office.[8] Although Smith's supervisor was not present during the interview, the FLRA ruled that this did no more than "temper [ ] . . . the coerciveness inherent in the unfamiliar surroundings." [FLRA Decision at 14]. The FLRA concluded that, under these circumstances, the Brookhaven safeguards were not met and that the Hospital therefore violated § 7116(a) of the Statute. The FLRA's finding is supported by the record. It is therefore neither arbitrary nor capricious, and we accordingly affirm it.

The Hospital contends that, Brookhaven safeguards notwithstanding, 38 C.F.R. § 0.735-21(f), a Veterans Administration regulation, required Smith to submit to questioning. That regulation requires employees to

> furnish information and testify freely and honestly in cases respecting employment and disciplinary matters. Refusal to testify, concealment of material facts, or willfully inaccurate testimony in connection with an investigation or hearing may be grounds for disciplinary action.[9]

38 C.F.R. § 0.735-21(f). The FLRA determined that the regulation is not applicable here. As it pointed out, the Hospital's regulation subjects an employee to discipline for a refusal to provide information in two circumstances: in connection with an investigation, and in connection with a hearing. Discipline may be imposed if an employee refuses to testify, testifies inaccurately, or conceals material facts. We will examine the two aspects of the regulation in turn.

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[8] In addition, Smith was asked to speak to Geffner not by her own supervisor, but by a higher-level supervisor. This can only have added to the coerciveness of the surrounding circumstances.

[9] "An employee, however, will not be required to give testimony against himself or herself in any matter in which there is indication that he or she may be involved in a violation of law wherein there is a possibility of self-incrimination." 38 C.F.R. § 0.735-21(f).

The first aspect proscribes certain conduct in connection with disciplinary investigations. The Hospital suggests that because employees are required to "testify" they must provide answers to questions asked by investigators at any time during the course of an investigation. We need not consider whether that argument is correct because, as the FLRA noted, by the time Geffner asked to interview Smith the Hospital's investigation was complete. In seeking to question Smith, the Hospital was not conducting an investigation but preparing for a third-party hearing. As we explained above, we must presume that an employer investigates an employee's alleged disciplinary infractions before it fires the employee, not afterwards. *See supra* Part III. Thus, we agree with the FLRA's conclusion that the investigative aspect of the regulation is inapplicable.

The FLRA also ruled that the part of the Hospital's regulation governing employees' responsibilities with respect to hearings does not apply. Again, we agree. The effort to interview Smith did not involve an attempt to obtain her "testimony." Smith did not refuse to testify, either by way of deposition or as an actual witness; she did not testify falsely; nor did she "conceal" material facts. She merely declined to assist a lawyer in the preparation of a case. Smith was not requested to perform any act at, or as a part of, a "hearing." The employees who were questioned by Geffner were not placed under oath, cross-examined, or made subject to penalty of perjury. They were simply asked to provide information to Geffner which might assist her when she presented the hospital's case at a subsequent proceeding. Smith declined to do so. Such a refusal, as the FLRA pointed out, does not subject an employee to discipline under the regulation.

The FLRA's determination is not arbitrary or capricious. Moreover, it avoids a conflict between the Hospital's regulation and the agency's Brookhaven safeguards. Indeed, Brookhaven itself arose in precisely the circumstances of the case before us. There, as here, the employer sought to interview witnesses between the conclusion of its investigation and the commencement of a hearing. Brookhaven, 1982 WL 23283 at *1-2.[10] Brookhaven held that such a pre-hearing interview may not be achieved through coercion.[11]

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[10] Because the Hospital's regulation is not incompatible with Brookhaven in this case, we need not decide which would override the other if they conflicted--for example, if the FLRA asserted that Brookhaven applied during the investigative stage or in connection with the taking of discovery depositions in preparation for a hearing.

[11] The FLRA has also held, under Brookhaven, that an employer may not coerce union members into discussing upcoming third-party hearings that involve complaints of unfair labor practices brought by the union against the employer. *See, e.g.,* United States Dep't of the Air Force, Griffiss Air Force Base, Rome, New York, and Am. Fed'n of Gov't Employees, Local 2612, AFL-CIO, 38 FLRA 1552, 1991 WL 8399 FLRA (1991) (interview of chief steward in connection with hearing on unfair labor practice involving

Accordingly, notwithstanding the Hospital's regulation, we affirm the FLRA.

The Hospital's final contention is that the FLRA's interpretation of the regulation is incompatible with Navy Public Works Center, Pearl Harbor v. FLRA, 678 F.2d 97, 101 (9th Cir.1982) ("Pearl Harbor"). Under Pearl Harbor, it argues, an employer has a nonnegotiable right to enforce an employee's duty to account to supervisors for his or her performance.

We note, first, that, in Pearl Harbor, "the issue before us [was] whether the FLRA's holding that a proposal . . . is procedural under [5 U.S.C. § 7106] (b)(2) is 'reasoned and supportable.' " *Id*. at 100 (footnote omitted). That question, and therefore, Pearl Harbor's holding, bears no relation to the issue here.

Moreover, Pearl Harbor involved the question whether an employee suspected of misconduct could be compelled to cooperate in an investigation of that misconduct. 678 F.2d at 99 n. 2. *See also Id*. at 101 (stating that the case concerns a targeted employee's "duty to account, whether generally or in disciplinary investigations") (emphasis added). Here, however, the issue is whether a witness can be compelled to provide information at the post- investigatory third-party stage, in order to help the employer prepare for a third-party hearing. Pearl Harbor 's discussion regarding the duties of an employee to cooperate when suspected of an improper act tells us little about the obligations of a prospective witness to cooperate, and certainly nothing about a witness's obligations after the investigation into the improper act has been completed and the government has already taken the disciplinary action it deems appropriate. Whatever the merits of Pearl Harbor, therefore, it is of little assistance to us here.

Conclusion

For the above reasons, we uphold the determinations of the FLRA. As to the first issue, we find that the record fully supports the FLRA's findings that the interviews at issue here were formal discussions that concerned a grievance within the meaning of § 7114(a)(2)(A) of the Statute. Furthermore, the record supports the FLRA's finding that one employee, Stella Smith, did not submit voluntarily to questioning. The cases and regulations on which the Hospital relies pertain to circumstances different than those found here. We accordingly deny the Hospital's petition for review, and grant the cross- applications of the Union and the FLRA for enforcement of the FLRA's order.

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relocation of union office); Warren, 1988 WL 212811 (FLRA) (interview of bargaining unit employee in connection with hearing on union complaint that management interfered with its right to picket).

PETITION DENIED; CROSS-APPLICATION GRANTED.

c. Investigatory Examinations.

Section 7114(a)(2)(B) gives the exclusive representative a right to be present at "any examination of an employee in the unit by a representative of the agency in connection with an investigation if:

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

This right is generally called the "Weingarten Right," that being the case which gave the right to employees in the private sector. *See* NLRB v. Weingarten, 420 U.S. 251 (1975).

Understanding key terms is important. To qualify as an investigatory examination, the meeting must involve questioning of an employee as part of a searching inquiry to ascertain facts. "Agency representative" includes supervisors, management officials, personnel specialists, internal agency auditors, and inspectors general.[12] The term is broadly defined and applied. Defense Logistics Agency, 28 FLRA 1145 (1987). The term "examination" is also broadly construed. It need not be confrontational. A request to provide a written statement regarding an incident has been found to be an examination. INS, Del Rio, Texas and NAGE Local 2366, 46 FLRA 363 (1992).

The right of the union to be present is triggered only by the employee's request. If the employee does not request representation, management may hold the meeting without union notification. Management is not required to notify the employee of this right at the meeting. Management's obligation to notify the employee consists of an annual notification to all employees. § 7114(a)(3). If union representation is requested, management has three alternatives: allow a representative to attend; end the interview; or give the employee the option (in a non-threatening manner) of either answering the questions without the representative or having no interview. Bureau of Prisons, Leavenworth, 46 FLRA 820 (1992).

[12] An inspector general is a “representative” of an agency when he conducts an employee examination covered by § 7114(a). NASA v. FLRA, 119 S. Ct. 1979 (1999) (finding that while Congress intended that OIGs would enjoy a great deal of autonomy, the OIG investigative office still performs on behalf of the particular agency in which it is stationed and therefore acts as an agency representative when it conducts examinations covered by § 7114(a).)

In Navy Public Works Center, 4 FLRA 217 (1980), the Authority held that a union proposal giving employees the right to remain silent during discussions with supervisors which might lead to disciplinary action, was bargainable. The Ninth Circuit Court of Appeals refused to enforce this ruling. While recognizing the requirement for impact bargaining, the court believed this union proposal would severely erode, if not destroy, management's nonnegotiable authority to discipline under the statute. IBEW, Local 1186 v. Navy Public Works Center, Pearl Harbor, 678 F.2d 97 (9th Cir. 1982).

Agency negotiators should generally avoid giving greater rights in the form of warnings prior to interviews than those required by the CSRA. Miguel v. Department of the Army, 727 F.2d 1081 (Fed. Cir. 1984), involved the appeal of an MSPB decision that upheld the discharge of an employee for theft. One of three bases cited by the court for overturning the discharge, was the agency's failure to provide the employee with all the warnings required by the collective bargaining agreement.

The remedy for violation of the Weingarten rights is the revocation of any disciplinary actions that flow from the examination. In Dept of Navy v. FEMTC, 32 FLRA 222 (1988), the Authority ruled that if disciplinary action is taken against an employee for engaging in protected activity a make whole remedy is appropriate. However, a make whole remedy will not be ordered where the disciplinary action taken relates solely to an employee's misconduct independent of the examination itself. *See also* DOJ, Bureau of Prisons, 35 FLRA 431 (1990), *rev'd on other grounds*, DOJ v. FLRA, 939 F.2d 1170 (5th Cir. 1991).

d. Fact-Gathering Sessions.

A “fact-gathering” session is an interview between an agency representative and a bargaining unit employee to ascertain facts in preparation for third party proceedings. Sacramento Air Logistics Base and AFGE, 29 FLRA 594 (1987). Whenever such a meeting takes place, management must inform the employee who is to be questioned of the purpose of the questioning. Additionally, the management representative must obtain the employee’s participation in the interview on a voluntary basis, and assure the employee that no reprisal will take place if he or she refuses to participate in the questioning. These are called Brookhaven warnings after the case from which they were taken.

Internal Revenue Service and Brookhaven Service Center, 9 FLRA 930 (1982) consolidated two separate cases. In both, the unions had alleged violations of the formal discussion rules when agency counsel were speaking with witnesses for third party proceedings. In one case the attorney was questioning a witness in an unfair labor practice case. In the other the attorney was preparing for arbitration. In both cases the attorneys informed the employees that the interviews were voluntary, and that no reprisal would occur if they refused to be interviewed. However, neither time did the attorney give the union advance notice and an opportunity to attend the sessions.

The FLRA found that these were not automatically formal discussions, so no unfair labor practice was committed. The FLRA did recognize, however, that there was a need to guard against coercion and intimidation in these types of cases. It held, therefore, that not only must the employee be given the warnings mentioned above when they are asked to participate in fact-gathering sessions. Additionally, the questioning must occur in a context that is not coercive in nature, and must not exceed the scope of the legitimate purpose of the inquiry.

Brookhaven warnings must be given at all fact-gathering sessions, even if the discussion is formal and the union has been given advance notice and an opportunity to attend. Veterans Administration and AFGE, 41 FLRA 1370 (1991). Further, failure to give the warnings is an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1).

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